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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-186

PRENTIS McCOLLUM and ANNIE LOUISE WYCHE,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 27, 1973.

Opinions Below

The United States District Court for the Eastern District of New York rendered no opinion. The United States Court of Appeals for the Second Circuit affirmed without opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on June 27, 1973; a copy thereof is appended to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

No motion for a rehearing or extension of time within which to petition for certiorari was made.

Questions Presented For Review

1. Whether the count of the indictment charging conspiracy and petitioners' convictions thereon are violative of the doctrine of *Kotteakos* v. *United States*, 328 U.S. 750 as laid down by this Court.

2. Whether the conspiracy count is defective when numerous overt acts alleged in furtherance of the conspiracy were subsequently held not crimes under *United States* v. *Canton*, 470 F. 2d 861, *i.e.*, whether petitioners could be convicted of conspiracy to do acts which were not crimes.

3. Whether a conviction upon a multi-count indictment may stand where this indictment contains counts which do not charge a crime.

Statutes Involved

Title 18 USC, Section 2311, states in part as follows:

> Section 2311. Definitions.
>
> "Motor vehicle" includes an automobile, automobile truck, automobile wagon, motocycle, or any other self-propelled vehicles designed for running on land but not on rails;
>
> "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness . . . instrument or document or writing evidencing ownership of goods, wares, and merchandise.

Title 18 USC, Section 2312, states in part as follows:

> Section 2312. Transportation of Stolen Vehicles.
>
> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 USC, Section 2313, states in part as follows:

> Section 2313. Sale or receipt of stolen vehicles.
>
> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 USC, Section 2314, states in part as follows:

> Section 2314. Transportation of stolen goods, securities, moneys, fraudulent State Tax Stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited.

Title 18 USC, Section 2315, states in part as follows:

Section 2315. Sale or receipt of stolen goods, securities, moneys or fraudulent State tax stamps.

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen unlawfully converted, or taken.

Title 18 USC, Section 371, states in part as follows:

Section 371. Conspiracy to commit offense or to defraud U. S.

"If two or more persons conspire either to commit an offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Statement of the Case

Petitioner-appellant, ANNIE LOUISE WYCHE, was charged in three counts of a 30 count indictment, alleging violations of 18 U.S.C. 2312, 2313, 2314, 2315.[1] She was acquitted following a jury trial on the two substantive counts, one charging interstate transportation of a vehicle and the other charging transportation of a forged security.

The petitioner was convicted on the conspiracy count. The overt act alleged was identical to the substantive count of which petitioner was acquitted. The remaining overt acts alleged conspiracy to transport forged securities (motor vehicle registrations) in violation of 18 U.S.C. 2314. The Second Circuit held in *United States* v. *Canton*, 470 F. 2d 861 (1972) that motor vehicle registrations are not "securities" within the meaning of 18 U.S.C. 2314. Hence, petitioner was convicted of conspiring to commit an act that was not a crime. A copy of the conspiracy count of the indictment is appended to this petition.

Petitioner-appellant PRENTIS MCCULLOM was charged in 28 counts of the indictment including the one conspiracy count. Two counts were dismissed by the trial court. Petitioner was convicted of the remaining 26 counts. However, twelve of these counts concerned forged securities (motor vehicle registrations) which the Second Circuit subsequently held not to be securities under 18 U.S.C. 2314. Petitioner urges that the presence of these numerous "securities" counts deprived him of a fair trial, in that the jury cumulatively weighed these counts in arriving at a guilty verdict of the other counts following the three weeks of testimony.

---

[1] A total of 22 defendants were name in the indictment.

Reasons for Granting the Writ

I

The conspiracy charge violates the principle set forth in *Kotteakos* v. *United States*, 328 U.S. 750. The writ should be granted to preserve that determination by this Court.

The petitioners were indicted along with all of the 21 named defendants for conspiracy. Only one count of conspiracy was charged. However, the indictment itself actually alleged several separate conspiracies involving separate and distinct acts occurring over a period of more than two years, several states, persons, cars and registrations. Most defendants did not know each other, and their acts merely made up separate portions of separate "spokes" without a "rim" to enclose them.

The episodes alleged were so far apart and differently peopled as to destroy any semblence of relationship. *Schaffer* v. *United States*, 326 U.S. 511.

In *Bernard* v. *United States*, 342 F. 2d 309 (1965), the Ninth Circuit relying upon this Court's ruling in *Kotteakos*, reversed convictions as to all defendants on conspiracy in prosecution for staging a series of bogus auto accidents that took place over a one and one-half year period. That indictment named 28 persons and five collisions. The Court held that, at most, there were a "succession of separate conspiracies". *United States* v. *Borelli*, 336 F. 2d 376 (2nd Cir. 1964).

The instant case comes even closer to *Kotteakos*. There were 22 named persons and more than five separate thefts, and numerous forged registrations over a two year period. The need for this Court to uphold the *Kotteakos* principle requires that the writ be granted.

II

The Courts of Appeals of the various circuits presently stand in conflict on the question of whether a conviction upon a multi-count indictment may stand where the indictment contains counts which are defective and which do not charge a crime.

The Third Circuit has held in the case of *U.S.* v. *Roach*, 321 F. 2d 1 (3d Cir. 1963), that the submission to a jury of a four count indictment, one count of which does not charge an offense, is error, requiring a new trial on the three valid counts. The court stated, "It (the jury) was instructed that it could find the defendant guilty on Count III, yet the Government has conceded that Count III does not charge a crime. This being so, the Jury deliberated on a subject not properly before it. How far the appellant was prejudiced by the influence of that erroneous submission is beyond calculation. Again, only a new trial on Counts I, II and IV can remedy the error.", 321 F. 2d at 6.

The Seventh Circuit, in *U.S.* v. *Calhoun*, 257 F. 2d 673 (7th Cir. 1958), struck down convictions upon a five count indictment where one count was fatally defective, stating "striking down the Fifth Count necessarily cuts ground from under evidence received below on the conspiracy theory and leaves little other evidence in support of the verdicts." 257 F. 2d 681.

The District of Columbia Circuit, in *Cross* v. *United States*, 335 F. 2d 987 (D.C. Cir. 1964) reversed a conviction and ordered a new trial where there had been a prejudicial joinder of counts.

In that case, the defendant was charge with two robberies in one indictment. Defendant desired to testify in his own defense as to one robbery (count) only. The court held that the improper joinder of the two counts prevented defendant from testifying only as to the one count and required a new trial on the count upon which he was convicted.

The Second Circuit has held, in *U.S.* v. *Berlin*, 472 F. 2d 1001 (2d Cir. 1963), that a conviction on one count of a four count indictment would be allowed to stand where three counts were defective. The court reasoned that the defendant was not prejudiced by submission to the jury of defective counts. The rationale is that since the jury acquitted the defendant on two of the four counts, the jury "very carefully considered the evidence on each count and reached its verdict on the evidence relative thereto." 472 F. 2d at 1008.

In the case at bar, a 30 count indictment containing 14 concededly invalid counts was submitted to the jury. The overwhelming bulk of the evidence was submitted under the invalid counts, which charged violations of 18 U.S.C. 2314 and 2315. Petitioner McCollum was prejudiced beyond repair by the introduction of said evidence and the submission to the jury of said invalid counts. Petitioner was convicted on all 26 substantive counts charged, 12 of which were defective.

At issue is the disposition of the valid counts. Under the policy adopted by the Third, Seventh and D.C. Circuits, Petitioner should receive a new trial limited to the valid counts of the indictment. Under the Second Circuit policy, Petitioner is not entitled to a trial on the valid counts only.

Count 30 charged a conspiracy to commit all of the alleged substantive offenses, which included violations of 18 U.S.C. 2314 and 2315. Since it is now conceded that no crimes were properly charged under said sections, it is contended that the indictment could not validly charge a conspiracy to commit an act not a crime. Hence, Petitioners' conviction for conspiracy should be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

IRVING ENGEL
HAROLD C. HARRISON
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of June, one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

73-1378 73-1408 73-1453 73-1486

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PRENTIS MCCOLLUM, WILL W. L. GRISSETT, BEN FLOYD JR., FRANK JENKINS, FRED NOEL GRIMES, ANA BURNS, DENNIS BURNS, DONALD PRINCE SHACKELFORD, WILLIE HUDSON MCNAIR, ANNIE LOUISE WYCHE, LEONARD QUICK, MARGARET MCCOLLUM, VERA HORNE, JAMES BLANTON ELDER, ROBERT EDWARD QUICK, WILLIAM JOHNSON, HOLLY B. TYNER, CHRISTOPHER MILLER, SAMUEL COLLINS, EDWARD POE, WILLIE ALBERT ALLEN and GILBERT REAVES,

Defendants,

PRENTIS MCCOLLUM, FRANK JENKINS, ANA BURNS, ANNIE LOUISE WYCHE,

Defendants-Appellants.

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

APPENDIX B

* * *

COUNT THIRTY

On or about and between the 25th day of September, 1969 and the 31st day of March, 1971, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant PRENTIS MCCOLLUM, the defendant WILL W. L. GRISSETT, the defendant BEN FLOYD JR., the defendant FRANK JENKINS, the defendant FRED NOEL GRIMES, the defendant ANNA BURNS, the defendant DENNIS BURNS, the defendant DONALD PRINCE SHACKELFORD, the defendant WILLIE HUDSON MCNAIR, the defendant ANNIE LOUISE WYCHE, the defendant LEONARD QUICK, the defendant MARGARED MCCOLLUM, the defendant VERA HORNE, the defendant WILLIAM JOHNSON, the defendant HOLLY B. TYNER, the defendant CHRISTOPHER MILLER, the defendant SAMUEL COLLINS, the defendant EDWARD POE, the defendant WILLIE ALBERT ALLEN, the defendant GILRERT REAVES, the defendant ROBERT EDWARD QUICK, the defendant JAMES BLANTON ELDER, and Cynthia Wharton, a co-conspirator not herein indicted, did conspire, confederate and agree to commit offenses against the United States, in violation of Title 18, United States Code, Sec. 2312, Sec. 2313, Sec. 2314, Sec. 2315.

The defendant PRENTIS MCCOLLUM, the defendant WILL W. L. GRISSETT, the defendant BEN FLOYD, JR., the defendant FRANK JENKINS, the defendant FRED NOEL GRIMES, the defendant ANNA BURNS, the defendant DENNIS BURNS, the defendant WILLIE HUDSON MCNAIR, the defendant LEONARD QUICK, the defendant JAMES BLANTON ELDER, the defendant CHRISTOPHER MILLER, the defendant WILLIE ALBERT ALLEN, and Cynthia Wharton, a co-conspirator not herein indicted, did transport and cause to be transported in in-

terstate commerce stolen Motor Vehicles knowing the same to have been stolen in violation of Title 18, United States Code, Section 2312.

It was part of said conspiracy that the defendant PRENTIS MCCOLLUM, the defendant WILL W. L. GRISSETT, the defendant BEN FLOYD JR., the defendant FRANK JENKINS, the defendant FRED NOEL GRIMES, the defendant ANNA BURNS, the defendant DENNIS BURNS, the defendant WILLIE HUDSON MCNAIR, the defendant HOLLY B. TYNER, the defendant WILLIE ALBERT ALLEN, the defendant CHRISTOPHER MILLER, and Cynthia Wharton, a co-conspirator not herein indicted, did receive, conceal and dispose of stolen Motor Vehicles moving in interstate commerce, knowing the same to have been stolen in violation of Title 18, United States Code, Section 2313.

It was part of said conspiracy that the defendant PRENTIS MCCOLLUM, the defendant WILL W. L. GRISSETT, the defendant GILBERT REAVES, the defendant FRANK JENKINS, the defendant ANNA BURNS, the defendant SAMUEL COLLINS, the defendant EDWARD POE, the defendant FRED NOEL GRIMES, the defendant ANNIE LOUISE WYCHE, the defendant WILLIE HUDSON MCNAIR, the defendant DONALD PRINCE SHACKELFORD, the defendant BEN FLOYD, JR., the defendant MARGARET MCCOLLUM, the defendant, VERA HORNE, the defendant HOLLY B. TYNER, and Cynthia Wharton, a co-conspirator not herein indicted, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce falsely made and forged securities, to wit, fraudulent New York State Motor Vehicle Registration Certificates evidencing ownership or interest in Motor

Vehicles, knowing the same to have been falsely made and forged, in violation of Title 18, United States Code. Section 2314.

It is part of said conspiracy that the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant FRED NOEL GRIMES, the defendant WILL W. L. GRISSETT, the defendant HOLLY B. TYNER, with unlawful and fraudulent intent, did receive, conceal and dispose in interstate commerce of falsely made and forged securities, to wit; fraudulent New York State Motor Vehicle Registration Certificates, evidencing ownership or interest in Motor Vehicles, knowing the same to have been falsely made and forged in violation of Title 18, United States Code, Section 2315.

In furtherance of the unlawful conspiracy and for the purpose of effecting the objects thereof, the defendant PRENTISS MCCOLLUM, the defendant WILL W. L. GRISSETT, the defendant BEN FLOYD, JR., the defendant FRANK JENKINS, the defendant FRED NOEL GRIMES, the defendant ANNA BURNS, the defendant DENNIS BURNS, the defendant WILLIE HUDSON MCNAIR, the defendant HOLLY B. TYNER, the defendant WILLIE ALBERT ALLEN, the defendant CHRISTOPHER MILLER, the defendant DONALD PRINCE SHACKELFORD, the defendant ANNIE LOUISE WYCHE, the defendant LEONARD QUICK, the defendant MARGARET MCCOLLUM, the defendant VERA HORNE, the defendant JAMES BLANTON ELDER, the defendant ROBERT EDWARD QUICK, the defendant WILLIAM JOHNSON, the defendant SAMUEL COLLINS, the defendant, EDWARD POE, the defendant GILBERT REAVES, and Cynthia Wharton, a co-conspirator not herein indicted, did commit the following overt acts:

Appendix B

OVERT ACTS

1. On or about the 1st day of August 1969, within the Eastern District of New York, Cynthia Wharton, a co-conspirator not herein indicted, sold fraudulently validated New York State Motor Vehicle Registration Certificates, Sticker No. 3245272, Office Symbol NWZ to EDWARD POE.

2. On or about the 26th day of August, 1969, the defendant DONALD PRINCE SHACKELFORD registered a stolen 1968 Buick Motor Vehicle, altered Vehicle Identification No. 8H922882, with a fraudulent New York State Motor Vehicle Registration Certificate, Sticker No. 3245272, New York State Motor Vehicle Office Symbol "NWZ".

3. On or about the 25th day of September, 1969, within the Eastern District of New York, the defendant DONALD PRICE SHACKELFORD received a stolen 1969 Chrysler Motor Vehicle, Vehicle Identification No. CP46G9C300798.

4. On or about the 25th day of September, 1969, the defendant VERA HORNE, an employee of the Department of Motor Vehicles of the State of New York, registered a stolen 1969 Chrysler Motor Vehicle VIN CP46G9C300798 for the defendant DONALD PRINCE SHACKELFORD on the basis of a fraudulent New York State Registration Certificate, Sticker No. 3245272 dated December 10, 1969, Office Symbol "NWZ".

5. On or about the 1st day of June, 1970, within the Eastern District of New York, Frederick D. Delfyette, met the defendant WILLIAM JOHNSON and the defendant PREN-

TIS MCCOLLUM at Johnson's Garage, 104th Street and Northern Boulevard, Queens, New York.

6. On or about the 2nd day of July, 1970, within the Eastern District of New York, Frederick D. DelFyette, received a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number PO994232, from defendant PRENTIS MCCOLLUM.

7. On or about the 3rd day of July 1970, within the Eastern District of New York, Frederick D. DelFyette received from the defendant PRENTIS MCCOLLUM and the defendant DONALD PRINCE SHACKELFORD a fraudulent New York State Registration Certificate, Sticker No. 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ" for a 1970 Cadillac Motor Vehicle Identification Number PO994232.

8. On or about the 2nd day of July 1970, within the Eastern District of New York, Frederick D. DelFyette received from the defendant PRENTIS MCCOLLUM, a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number PO996432.

9. On or about the 2nd day of July, 1970, Frederick D. DelFyette received from the defendant DONALD PRINCE SHACKELFORD and the defendant PRENTIS MCCOLLUM a fraudulent New York State Registration Certificate, Sticker No. 3245272 dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", for the 1970 Cadillac Motor Vehicle, Vehicle Identification Number PO996432.

10. On or about the 23rd day of July, 1970, within the Eastern District of New York PRENTIS MCCOLLUM delivered a stolen 1970 Cadillac Motor Vehicle, VIN FO432297 to Audrey Rothman, 15 Fairfield Road, Great Neck, New York.

11. On or about the 24th day of July, 1970, within the Eastern District of New York the defendant DONALD PRINCE SHACKELFORD and the defendant PRENTIS MCCOLLUM delivered a fraudulent New York State Registration Certificate, Sticker Number 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", for a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number FO432297 to Frederick D. DelFyette.

12. On or about August 17, 1970, the defendant PRENTIS MCCOLLUM, the defendant BEN FLOYD JR., the defendant WILL W. L. GRISSETT, the defendant CHRISTOPHER MILLER did transport and cause to be transported in interstate commerce a stolen 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY89A831708 from Queens, New York, within the Eastern District of New York, to Washington, D.C., knowing the same to have been stolen.

13. On or about the 17th day of August, 1970, the defendant PRENTIS MCCOLLUM, the defendant BEN FLOYD, JR., the defendant WILL W. L. GRISSETT, the defendant CHRISTOPHER MILLER, did receive, conceal and dispose of a stolen 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY89A831708, at Washington, D.C. moving in interstate commerce from Queens, New York, within the

Eastern District of New York to Washington, D.C. knowing it to be stolen.

14. On or about the 17th day of September, 1970, the defendant PRENTIS MCCOLLUM, the defendant WILL W. L. GRISSETT, and Cynthia Wharton, a co-conspirator, not herein indicted, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from Brooklyn, New York, within the Eastern District of New York to Washington, D.C. a falsely made and forged security, to wit, a fraudulent New York State Vehicle Registration Certificate, Sticker Number 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", evidencing ownership or interest in a 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY89AS31708 by Paul J. Grissett, 205-01 Hollis Avenue, Hollis, New York, knowing the same to have been falsely made and forged.

15. On or about the 17th day of September, 1970, the defendant PRENTIS MCCOLLUM, the defendant WILL W. L. GRISSETT, and Cynthia Patricia Wharton, a co-conspirator not herein indicted, did receive, conceal and dispose in interstate commerce a falsely made and forged security, to wit, a fraudulent New York State Vehicle Registration Certificate, Sticker Number 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", evidencing ownership or interest in a 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY09AS31708 by Paul J. Grissett, 205-01 Hollis Avenue, Hollis, New York, knowing the same to have been falsely made and forged.

Appendix B

16. On or about the 25th day of September, 1970, within the Eastern District of New York, the defendant DONALD PRINCE SHACKELFORD sold to the defendant James Blanton Elder a stolen 1968 Buick Motor Vehicle, Vehicle Identification Number 8H922882.

17. On or about the 25th day of September, 1970, within the Eastern District of New York, the defendant DONALD PRINCE SHACKELFORD had in his possession a stolen 1969 Buick Motor Vehicle, altered Vehicle Identification Number 494878H922882.

18. On or about the 6th day of September, 1970, within the Eastern District of New York, the defendant SAMUEL COLLINS, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, and Cynthia Wharton, a co-conspirator not herein indicted, met in the vicinity of 367 Lincoln Place, Brooklyn, New York.

19. On or about the 28th day of October, 1970, Cynthia Patricia Wharton, a co-conspirator not herein indicted, registered a stolen 1969 Ford Van, Vehicle Identification Number C61EUE15876, in the name of Anna Burns, on the basis of a fraudulently validated New York State Registration Certificate, Sticker Number 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ".

20. On or about the 26th day of October, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant ANNA BURNS, did transport and cause

to be transported in interstate commerce a stolen 1969 Ford Van Motor Vehicle, Vehicle Identification Number C61EUE15876, from Queens, New York, within the Eastern District of New York to Whippany, New Jersey, knowing the same to have been stolen.

21. On or about the 26th day of October, 1971, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, and the defendant ANNA BURNS, did receive, conceal and dispose of a stolen 1969 Ford Van Motor Vehicle, Vehicle Identification Number C61EUE15876, at Whippany, New Jersey, moving in interstate commerce from Queens, New York, within the Eastern District of New York, to Whippany, New Jersey, knowing it to be stolen.

22. On or about the 28th day of October, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant ANNA BURNS, the defendant SAMUEL COLLINS, the defendant EDWARD POE, and Cynthia Wharton, a co-conspirator not herein indicted, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from Brooklyn, New York, within the Eastern District of New York, to Fair Lawn, New Jersey, a falsely made and forged security, to wit, a fraudulent New York State Vehicle Registration Certificate, Sticker Number 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", evidencing ownership or interest in a 1969 Ford Van Motor Vehicle, Vehicle Identification Number 15896 by Anna Bolega, 125 Laffetter Street, Bronx, New York, knowing the same to have been falsely made and forged.

23. On or about the 13th day of November, 1970, within the Eastern District of New York, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant WILL W. L. GRISSETT, and the defendant FRED NOEL GRIMES, did transport and cause to be transported in interstate commerce a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number HO186910 from Queens, New York, within the Eastern District of New York to Washington, D.C., knowing the same to have been stolen.

24. On or about the 13th day of November, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant FRED NOEL GRIMES, the defendant WILL W. L. GRISSETT, and the defendant HOLLY B. TYNER, did receive, conceal and dispose of a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number HO186910, at Minneapolis, Minnesota, moving in interstate commerce from Queens, New York, within the Eastern District of New York to Minneapolis, Minnesota, knowing it to be stolen.

25. On or about the 18th day of November, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant FRED NOEL GRIMES, the defendant WILL W. L. GRISSETT, and Cynthia Wharton, a co-conspirator not herein indicted, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from Brooklyn, New York within the Eastern District of New York, to Washington, D.C., a falsely made and forged security, to wit, a fraudulent New York State Motor Vehicle Registration Certificate, Sticker Number

3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", evidencing ownership or interest in a 1970 Cadillac Motor Vehicle, Vehicle Identification Number JO647279 by Glen Prentis, 160-23 169th Street, Bayside, New York, knowing the same to have been falsely made and forged.

26. On or about the 18th day of November, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant, FRED NOEL GRIMES, the defendant WILL W. L. GRISSETT, and Cynthia Wharton, a co-conspirator not herein indicted, did receive, conceal and dispose in interstate commerce of a falsely made and forged security, to wit, afraudulent New York State Motor Vehicle Registration Certificate, Sticker Number 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", evidencing ownership or interest in a 1970 Cadillac automobile, Vehicle Identification Number JO-647279 by Glen Prentis, 160-25 169th Street, Bayside, Long Island, New York, knowing the same to have been falsely made and forged.

27. On or about the 26th day of January, 1971, at Minneapolis, Minnesota, the defendant HOLLY B. TYNER, received a stolen 1970 Cadillac, Motor Vehicle Vehicle Identification Number HO186910.

28. On or about the 16th day of November, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant ANNA BURNS, did transport and cause to be transported in interstate commerce a stolen 1970

Lincoln Motor Vehicle, Vehicle Identification Number OY89A615508, from Oceanside, New York, within the Eastern District of New York, to Fair Lawn, New Jersey, knowing the same to have been stolen.

29. On or about the 16th day of November, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, and the defendant ANNA BURNS, did receive, conceal and dispose of a stolen 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY89A815508 at Fair Lawn, New Jersey, moving in interstate commerce from Oceanside, New York, within the Eastern District of New York, to Fair Lawn, New Jersey, knowing it to be stolen.

30. On or about the 11th day of November, 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant ANNA BURNS, and Cynthia Wharton, a co-conspirator not named herein indicted, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from Brooklyn, New York, within the Eastern District of New York, to Trenton, New Jersey a falsely made and forged security, to wit, a fraudulent New York State Motor Vehicle Registration Certificate, Sticker No. 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", evidencing ownership or interest in a 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY09A818952 by Anna Balega, 240 Gun Hill Road, Bronx, New York, knowing the same to have been falsely made and forged.

Appendix B

31. On or about the 18th day of October, 1970 the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant ANNA BURNS, and the defendant DENNIS BURNS, did transport and cause to be transported in interstate commerce a stolen 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY89A855945 from Queens, New York, within the Eastern District of New York to Garfield, New Jersey, knowing it to be stolen.

32. On or about the 16th day of October 1970, the defendant PRENTIS MCCOLLUM, the defendant FRANK JENKINS, the defendant ANNA BURNS, and the defendant DENNIS BURNS, did receive, conceal and dispose of a stolen 1970 Lincoln Motor Vehicle, Vehicle Identification Number OY89A855945 at Garfield, New Jersey moving in interstate commerce from Queens, New York, within the Eastern District of New York to Garfield, New Jersey, knowing it to be stolen.

33. On or about the 9th day of February 1971 PRENTIS MCCOLLUM fraudulently received Nine Thousand ($9,000.00) Dollars from the United States Life Insurance Company.

34. On or about the 9th day of February 1971 PRENTIS MCCOLLUM delivered Six Thousand ($6,000.00) Dollars to ANNIE LOUISE WYCHE.

35. On or about the 1st day of March, 1971 the defendant PRENTIS MCCOLLUM received money from the defendant WILLIE HUDSON MCNAIR for the purchase of a stolen 1970 Cadillac Motor Vehicle.

36. On or about the 25th day of March, 1971 the defendant PRENTIS MCCOLLUM, the defendant, ANNIE LOUISE WYCHE, the defendant JAMES BLANTON ELDER, the defendant LEONARD QUICK, the defendant WILLIE HUDSON MCNAIR, and Cynthia Wharton, a co-conspirator not herein indicted, did transport and cause to be transported in interstate commerce a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number HO246356 from Brooklyn, New York, within the Eastern District of New York to Laurinburg, North Carolina, knowing the same to have been stolen.

37. On or about the 31st day of March, 1971, the defendant PRENTIS MCCOLLUM, the defendant WILLIE HUDSON MCNAIR, the defendant DONALD PRINCE SHACKELFORD, Cynthia Wharton, a co-conspirator not herein indicted, did receive, conceal and dispose of a stolen 1970 Cadillac automobile, Vehicle Identification Number HO246356 at Laurinburg, North Carolina, moving in interstate commerce from Brooklyn, New York, within the Eastern District of New York to Laurinburg, North Carolina, knowing the same to have been stolen.

38. On or about the 31st day of March, 1971, the defendant PRENTIS MCCOLLUM, the defendant WILLIE HUDSON MCNAIR, the defendant DONALD PRINCE SHACKELFORD, Cynthia Wharton, a co-conspirator not herein indicted, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from Queens, New York, within the Eastern District of New York to Laurinburg, North Carolina, a falsely made and forged security, to wit, a fraudulent New York State Motor Vehicle Regis-

tration Certificate, Sticker Number 3245272, dated December 10, 1969, New York State Motor Vehicle Office Symbol "NWZ", evidencing ownership or interest in a 1970 Cadillac Motor Vehicle, Vehicle Identification Number HO-446258 by Alex F. Kapper, 215-10 Jamaica Avenue, Queens Village, New York, knowing the same to have been falsely made and forged.

39. On or about the 25th day of December, 1970, the defendant ROBERT EDWARD QUICK had in his possession the fraudulent New York State Motor Vehicle validating stamp, Sticker Number 3245272, New York State Motor Vehicle Office Symbol NWZ.

40. On or about the 29th day of January, 1971 Cynthia Wharton, a co-conspirator not herein indicted, furnished Margaret McCollum with New Jersey License plates and New Jersey Registrations.

41. On or about February 17, 1971, the defendant PRENTIS MCCOLLUM, the defendant BEN FLOYD, JR., the defendant WILLIE ALBERT ALLEN, did transport and cause to be transported in interstate commerce a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number FO-179768, from Queens, New York, within the Eastern District of New York to Moorestown, New Jersey, knowing the same to have been stolen.

42. On or about February 17, 1971, the defendant PRENTIS MCCOLLUM, the defendant BEN FLOYD, JR., and the defendant WILLIE ALBERT ALLEN, did receive, conceal and

dispose of a stolen 1970 Cadillac Motor Vehicle, Vehicle Identification Number FO179768 at Queens, New York, moving in interstate commerce from Queens, New York within the Eastern District of New York to Moorestown, New Jersey, knowing it to be stolen.

A TRUE BILL

Foreman

United States Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-185

ANNA BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-186

PRENTISS MCCOLLUM AND ANNIE LOUISE WYCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5179

FRANK JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1973. The petitions for writs of certiorari in Nos. 73-185 and 73-186 were filed on July 26, 1973, and the petition in No. 73-5179 was filed on July 25, 1973.

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by the admission of evidence relating to counts dismissed by the court before sentencing (raised in Nos. 73-186 and 73-5179).

2. Whether the evidence showed multiple conspiracies rather than a single conspiracy (raised in Nos. 73-185 and 73-186).

3. Whether there was plain error in the trial court's instruction concerning knowledge by defendants that the vehicles in question had traveled in interstate commerce (raised in No. 73-185).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy and (with the exception of petitioner Wyche) of substantive offenses involving interstate transportation, receipt and concealment of stolen motor vehicles, in violation of 18 U.S.C. 371, 2312 and 2313. Various sentences were imposed.[1] The court of appeals affirmed in a memorandum order without opinion (Pet. No. 73-186, App. A).

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[1] McCollum was sentenced to concurrent terms of imprisonment for five years, pursuant to 18 U.S.C. 4208(a)(1), on 14 substantive counts, and a fine of $5,000 and three years' probation for conspiracy, following service of his sentence on the substantive charges.

Jenkins received concurrent sentences of imprisonment for three years, pursuant to 18 U.S.C. 4208(a)(1), on eight substantive counts and a fine of $1,000 for conspiracy.

Co-defendant Vaden, who had pleaded guilty but had not yet been sentenced, testified as a government witness. According to Vaden's testimony, during the period of the conspiracy (September 25, 1969, to March 31, 1971) the basic pattern of operation was for petitioner McCollum to direct Vaden to steal a particular kind of car from the streets of New York City, which he would then do (Tr. 58, 63-68, 84). Following delivery of the stolen vehicle by Vaden, either McCollum or petitioner Jenkins would contact co-conspirator Wharton, also a government witness, who handled the preparation of false New York registration of the car (Tr. 686-706, 732-770, 1079-1120a). Vaden would deliver the vehicle to the out-of-state purchaser (Tr. 150-172).

During the month of October 1970, two 1970 Lincoln Continental cars were stolen in New York City (Tr. 2206-2208, 2504). Vaden delivered these cars to petitioner Burns in New Jersey. Both of them had broken ignition switches and had to be started by using a screwdriver (Tr. 109-144). Burns complained to Jenkins, who relayed the message to Wharton, that one of the Lincolns did not have a bogus plate to match the identification number on the registration supplied with the car (Tr. 753-754). A New Jersey state policeman located and seized one of these cars in New Jersey. Burns told the officer she bought the car for $4000 from a named party in New York (Tr. 2343-2350). The second Lincoln, which the officer had observed in Burns' driveway, was later seized at the residence of Burns' son (Tr. 2356-2361).

Burns received concurrent sentences of imprisonment for eighteen months, pursuant to 18 U.S.C. 4208(a)(1) on six substantive counts, sentence to be suspended on all but sixty days; in addition to which she was placed on probation for sixteen months.

Wyche received a suspended sentence for conspiracy and was placed on probation for one year.

Several circumstances inculpated petitioner Wyche in the conspiracy:

(a) In February 1971, Vaden stole a white Lincoln for McCollum. About a week later, Vaden went with McCollum, Wyche, and Wharton to where the Lincoln was parked and made an unsuccessful effort to get it started (Tr. 218-224).

(b) Defendant Grissett testified that he learned from McCollum in the summer of 1970 that McCollum dealt in "hot" cars and arranged to buy a white Lincoln Continental from him. He thereafter went with McCollum to Wyche's home (Tr. 536-542). Grissett, a resident of Washington, D.C., returned to New York shortly thereafter, meeting McCollum and Jenkins at Wyche's house. Arrangements were made to obtain a New York registration certificate and an affidavit of sale for the Lincoln. He stayed that night at Wyche's house (Tr. 587-593).

(c) In March 1971, Wharton and McCollum agreed to transport a stolen 1970 Cadillac from New York to North Carolina (Tr. 1119-1120). They met with two other parties at Wyche's home and talked about the trip in Wyche's presence. McCollum obtained from Wyche the keys to her garage and, with her consent, transferred the tags from her car to the stolen car (Tr. 1408-1410).

ARGUMENT

1. After the jury had returned its verdict finding McCollum, Jenkins and Burns guilty, *inter alia*, of transporting interstate falsely made securities, in violation of 18 U.S.C. 2314, but before sentencing, the Court of Appeals for the Second Circuit held in another case that New York State motor vehicle registration certificates were not securities within the meaning of

this statute. *United States* v. *Canton*, 470 F. 2d 861. Accordingly, the district court dismissed the counts involving the registration certificates and imposed sentences solely as to the remaining counts upon which a verdict of guilty had been returned.

Petitioners in No. 73-186 and No. 73-5179 urge that in these circumstances consideration by the jury of the evidence relating particularly to these counts was prejudicial. The short answer is that such evidence would have been admissible in any event at this trial. All the "securities" counts, with the exception of counts 21, 22, and 24, related to the obtaining of fraudulent registrations for vehicles whose interstate transportation (or receipt or concealment after such transportation) was alleged in other counts of the indictment (Tr. 2924-2937). Such evidence was therefore relevant to show knowledge and intent as to the related "car" counts. Cf. *United States* v. *Berlin*, 472 F. 2d 1002, 1009 (C.A. 2). As to counts 21, 22, and 24, the evidence was admissible to show knowledge, intent, common scheme or plan by unlawful acts of similar nature, especially in view of the close relationship in time and place. See, *e.g.*, *United States* v. *Payne*, 467 F. 2d 828 (C.A. 5). As to these three counts, which applied only to McCollum, it may be added that the evidence of guilt on the part of this petitioner was overwhelming (*supra*, pp. 3-4).[2]

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[2] The factual situations in the cases upon which petitioners rely were quite different from that here presented. *United States* v. *Roach*, 321 F. 2d 1 (C.A. 3), a bank robbery case, involved an aggregation of errors. The court held, under *Milanovich* v. *United States*, 365 U.S. 551, that the conceded impropriety in instructing the jury on one of the counts constituted one of the several reasons for requiring a new trial. *United States* v. *Calhoun*, 257 F. 2d 673 (C.A. 7), involved reception of a large volume of evidence against all defendants which was admissible only upon a theory of conspiracy, but the charge of conspiracy was fatally defective because it omitted the essential element of

2. Petitioners in No. 73-185 and No. 73-186, relying on *Kotteakos* v. *United States,* 328 U.S. 750, argue that the evidence established separate conspiracies. In *Kotteakos* it was held that the evidence showed eight or more separate and distinct conspiracies, the only nexus among them being that one man participated in them all. Such is not the case here.

In this case there was a pattern of criminal activity with McCollum and Jenkins as the ringleaders (*supra,* p. 3). The participation of Anna Burns and Annie Louise Wyche, while of less importance, was central to this activity. The relationship of other defendants who did not appeal, their acquaintanceship with the other parties or their knowledge of the purposes of the scheme is of no significance so far as these petitioners are concerned. Cf. *Blumenthal* v. *United States,* 332 U.S. 539. With respect to petitioner Burns, who places particular emphasis on this contention, the evidence of her guilt under the substantive counts was overwhelming and the light sentence imposed was concurrent as to all counts—both substantive and conspiracy. Accordingly, this Court need not consider contentions relating to the conspiracy count. See *Barnes* v. *United States,* No. 72-5443, decided June 18, 1973, slip op. 8-9, n. 11.

3. Petitioner Burns urges, without identifying any particular part of the charge, that the court "failed to

scienter. In *Cross* v. *United States,* 335 F. 2d 987 (C.A. D.C.), charges of robbing a church rectory and of robbing a tourist home some two and a half months later were tried together, over the protests of one defendant, who wished to remain silent as to one charge but to testify as to the other. When separate trials were denied, this defendant testified as to both charges, winning acquittal on the one as to which he wished to testify, but apparently hurting himself and his co-defendant on the charge as to which he remained silent. A new trial was ordered as to both defendants. The distinguishing feature about the present case is that the evidence received having particular relevance to the "securities" counts was, for the reasons above stated, also relevant and entirely proper as to the "car" counts, so that petitioners were in no way prejudiced.

instruct the jury that in order to convict the defendants of conspiracy, they must have found beyond a reasonable doubt that the defendants knew that the allegedly stolen automobiles had traveled in interstate commerce" (Burns Pet. 7). No such objection was made at trial. Moreover, the court gave such an instruction (Tr. 2921, 2930, 2931, 2937-2938, 2939, 2940, 2942). There was no error, much less plain error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1973.

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